Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 84-1713.

In the Supreme Court of the United States.

OCTOBER TERM, 1984.

LEONA BRENNER,
PETITIONER,

v.

UNIVERSAL-RESILITE COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Brief in Opposition.

CORRECTED COPY

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BEST AVAILABLE COPY

Question Presented.

Did the Court of Appeals properly order a new trial of the action between Leona Brenner, the petitioner, and Universal-Resilite Company, the respondent, based upon a perceived "compromise verdict" at the original trial, without expressly stating in its written opinions that the trial judge had abused his discretion in ordering a new trial limited to the issue of damages only?

Table of Contents.

Statement of the case 1

Summary of argument 2

Reasons why the petition should be denied

I. There are no special or important reasons why this Court should permit review on writ of certiorari 3

A. The Court of Appeals need not explicate the logic employed in arriving at its decisions 4

B. The Court of Appeals did not discount, in its original opinion, the possibility that a "Compromise Verdict" had been rendered by the jury 6

C. Each of the petitioner's reasons why its petition should be allowed is invalid 7

Conclusion 11

Supplemental Appendix 1a

Table of Authorities.

CASES.

Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931) 9

National Fire Ins. Co. v. Great Lakes Warehouse Corp., 261 F.2d 35 (7th Cir. 1958) 5, 11

Schuerholz v. Roach, 58 F.2d 32 (4th Cir. 1932) 9

Simmons v. Fish, 210 Mass. 563, 97 N.E. 102 (1912) 9

Southern R. Co. v. Madden, 235 F.2d 198 (4th Cir. 1956) 9

Yates v. Dann, 11 F.R.D. 386 (D.C. Del. 1951) 8

FEDERAL RULES.

Supreme Court Rule
Rule 17 3
Rule 17.1 3
Rule 17.1(a) 3
First Circuit Rule 14 4, 6
Federal Rules of Appellate Procedure, Rule 36 4

STATUTES.

Massachusetts General Laws
c. 231, § 85 7

No. 84-1713.

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Statement of the Case.

The respondent adopts the petitioner's statement of the case except in the following particular respects.

The trial judge entered judgment against Universal-Resilite Company (hereinafter "Resilite") for breach of implied warranty of merchantability based upon the jury's answer to a special question which inquired only whether Resilite had been *negligent*. (See Supplemental Appendix 1a-2a).

The November 19, 1984 opinion of the Court of Appeals did *not* state that the inadequate damages awarded to Leona Brenner (hereinafter "Brenner") failed to demonstrate a compromise on liability.

The Court of Appeals opinions in this case cannot be characterized as a "curious litany" of decisions. Resilite disagrees with Brenner's speculation regarding the impact of Brenner's petition for partial rehearing on the Court of Appeals' action. Resilite agrees that the Court of Appeals did withdraw its original opinion and on January 11, 1985 adopted an alternative theory (originally proposed by Judge Aldrich in a concurring opinion in the Court's November 19, 1984 decision) as the basis for its ruling. The January 11, 1985 order did not change in any way the ultimate outcome of the appeal. A new trial was still ordered on Brenner's action against Resilite for breach of warranty and negligent inspection and repair of the product involved.

Resilite does not agree with Brenner's characterizator of the content of her second petition for rehearing. Resilite simply states that the petition requested the Court of Appeals to specify in a written opinion the standard of review applied by the Court in reaching the decision which underlay its January 11, 1985 memorandum and order. The Court of Appeals denied Brenner's second petition in its totality.

Brenner filed a petition for rehearing *en banc* which was also denied. Brenner also filed two motions to recall mandate, both of which were denied.

Summary of Argument.

The petitioner contends that because the Court of Appeals failed to specifically discuss the standard of review applied by

it in determining the appeal below, the Court's reversal of the trial court's judgment was therefore improper. This contention is without any legal foundation. The Court of Appeals was not required to issue any opinion at all. The brevity of the opinion that the Court of Appeals did issue is not the type of "special and important reason" necessary to support a petition for review on certiorari. Sup. Ct. R. 17.

The petitioner also suggests that the Court of Appeals expressly declared in its November 19, 1984 opinion that the jury below had not rendered a compromise verdict, and that the Court completely reversed this view in its January 11, 1985 opinion. This is not true. The Court of Appeals specifically refrained from deciding the "compromise verdict" issue in its November 19, 1984 opinion. That issue was open and available for the Court of Appeals to determine in its January 11, 1985 opinion. Consequently, the Court of Appeals' opinions below are entirely consistent and do not present any "special and important reasons" for allowing the instant petition.

Reasons Why the Petition Should Be Denied.

I. There are No Special or Important Reasons Why This Court Should Permit Review on Writ of Certiorari.

In order to obtain review on writ of certiorari the petitioner must demonstrate "special and important reasons therefor." Sup. Ct. R. 17.1. The petitioner is apparently suggesting to this Court that the Court of Appeals for the First Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a); see also Brenner's Petition for a Writ of Certiorari at 8.

A. *The Court of Appeals Need Not Explicate the Logic Employed in Arriving at its Decisions.*

In support of its allegation that the Court of Appeals had engaged in an egregious departure from the usual method of proceeding, Brenner first emphasizes that the Court of Appeals must employ an "abuse of discretion" standard in order to reverse the trial court's action on a motion for a new trial. Resilite readily concedes this much. Brenner goes on, however, to insist that because the Court of Appeals failed to include a discussion of the standard of review applied by it in adopting an alternative ground for ordering a new trial (i.e. the "compromise verdict" theory), the Court of Appeals "willfully refused to accord the petitioner the process unarguably due." See Petition at 14.

The Court of Appeals was not required to issue a written opinion in the proceedings below. *See* Fed.R.App.P. 36; 1st Cir. R. 14. Consequently, the petitioner should not now be heard to complain that the Court of Appeals failed to discuss at length the standard of review employed by it in arriving at the conclusion stated in its January 11, 1985 order.

The Court's key findings were clearly set out, however. First, "the jury's finding damages in the amount of $5,000 (approximately the amount of the medical bills) was inadequate beyond any possibility of rational explanation." (A. 31.) This fact, coupled with the jury's finding of 95% contributory negligence caused the Court of Appeals to hold that:

> Whether compassion or compromise, and more than likely it would be the latter, the verdict was inescapably a miscarriage of justice, and the finding of liability, as well as the damage assessment, must be vacated.

(A. 32.)

Although not explicitly stating that the trial judge abused his discretion in ordering only a partial new trial limited to the issue of damages, the strong language used by the Court in its four page memorandum and order of January 11, 1985, makes it clear that the trial court's failure to correct what the Court of Appeals found to be "inescapably a miscarriage of justice" constituted an abuse of discretion. The petitioner's contention that the Court of Appeals failed to "utilize" the abuse of discretion standard simply because the Court did not state that it was using that standard is pure speculation which is contradicted by the categorical terms used by the Court in its January 11, 1985 order. Moreover, the petitioner's suggestion that the Court of Appeals issued its January 11, 1985 order "without even taking recognition of the fact that the district court had found to the contrary" (see Petition at 14) is again unsubstantiated speculation. The parties briefed and argued the "compromise verdict" issue before the Court of Appeals (A. 6), and the Court had before it in the Record the trial judge's denial of Resilite's motion for reconsideration based upon the "compromise verdict" theory (Supp. App. 5a). Once again, the failure to comment upon the trial court's denial of Resilite's motion for reconsideration does not necessarily indicate that the Court of Appeals failed to appreciate that the trial court took this action.

There is no rule of law which requires an appellate court to verbalize the standard of review applied by it in determining an appeal. In *National Fire Ins. Co.* v. *Great Lakes Warehouse Corp.*, 261 F.2d 35 (7th Cir. 1958), the Court of Appeals reversed the judgment of the district court holding that the trial judge erred in failing to allow a motion for a new trial on all issues, not just damages. The Court of Appeals stated: "It is absurd to say this is anything other than a compromise verdict and highly improper as a compromise, not only to damages, but on the issue of liability." *Id.* at 38. Without a word as to the

standard of review employed by it, the Court of Appeals for the Seventh Circuit reversed the trial court's judgment and remanded the case for a new trial on the issues of both liability and damages.

In the instant matter, it is clear from the extremely forceful language of the Court of Appeals' January 11, 1985 opinion that the Court was thoroughly convinced that the record showed a compromise verdict. The finding of an "abuse of discretion" is implicit, if not explicit in the opinion. The petitioner is not correct in its claim that the Court of Appeals demonstrated a "bold refusal to comply with the unquestionably applicable standard of review. . ." (see Petition at 8-9). On the contrary, it is quite evident from the unequivocal language used by the Court of Appeals in its January 11, 1985 opinion that the Court found an abuse of discretion on the part of the trial court. To require a more lengthy description of its reasoning would be both unnecessary and unduly burdensome to an already busy Court of Appeals. See 1st Cir. R. 14.

B. *The Court of Appeals did Not Discount, in Its Original Opinion, the Possibility that a "Compromise Verdict" had Been Rendered by the Jury.*

The petitioner has suggested that the Court of Appeals held, in its November 19, 1984 opinion, that there had not been a "compromise verdict" at the trial level. See Petition for Writ of Certiorari at 15-16. This is incorrect and misleading characterizator of the Court of Appeals opinion, the pertinent parts of which can be found in the Appendix to the Petition at 79-80. The Court of Appeals simply paraphrased Brenner's and Resilite's opposing views concerning the "compromise verdict" issue, and then proposed a third theoretical explanation for the jury verdict. The Court did not express any opinion regarding

the relative merits of the three theories. Since the Court was analyzing the issues only "within the framework of negligence law" (A. 77), it held that pursuit of any of the three theories would nullify the damage award under the Massachusetts law of comparative negligence. See Mass. G.L. c. 231, § 85. Consequently, the Court found it *unnecessary* to decide the "compromise verdict" issue.

Judge Aldrich did "not share the court's feelings on the subject of jury compromise" (i.e. that it was unnecessary to decide the issue). The issue was important, since the jury's finding of 5% negligence on the part of Resilite was the only basis for the trial judge's entry of judgment against Resilite on the breach of warranty claim. Thus, when the Court of Appeals, for whatever reason (and it is not ours to speculate), withdrew its November 19, 1984 opinion (which had held that the trial judge was incorrect in automatically translating a 5% negligence finding into a finding of breach of implied warranty), the "compromise verdict" issue surfaced again as a critical issue. If the 5% negligence finding had been arrived at by virtue of a compromise in order to award the plaintiff her medical expenses, then such a compromise would mandate a new trial on liability as well as damages.

The fact that the majority of the Court of Appeals originally felt it unnecessary to decide the "compromise verdict" issue, in no way precludes the Court from subsequently addressing the issue and resting its decision on this perfectly valid basis.

C. *Each of the Petitioner's Reasons Why Its Petition Should Be Allowed is Invalid.*

On pages 19 and 20 of her Petition, Brenner states five reasons why the petition should be allowed. Each of these reasons is an invalid or incorrect statement in support of the petition and should be disregarded by the Court. Each of the grounds relied upon by the Petitioner will be separately addressed.

1. The Trial Judge Never Stated that the Jury's Damage Award was Unrelated to Its Liability Decision.

The Petitioner's reference to page 113 of the Appendix does not support the petitioner's contention that the trial judge held that the jury's findings on liability and damages were unrelated. That page contained a portion of the trial judge's opinion on Brenner's motion for a new trial. There the judge stated: "It is clear that the jury did nothing more than award Brenner her medical expenses, ignoring completely the compelling and overwhelming evidence concerning pain, disability and disfigurement. It would be a miscarriage of justice to permit such a grossly inadequate award to stand" (A. 113-114). There was no comment whatsoever by the trial judge concerning the quality of the jury verdict on the issue of liability (which was a finding of 95% contributory negligence on the part of the plaintiff, and the remaining liability shared by two defendants, Harvard and Resilite (see Supp. App. 1a-4a).

It is misleading for Brenner to claim that these comments by the trial judge constituted an explication by him as to "why the jury's aberrational damages verdict was not interrelated with its liability decision (see Petition at 19).

The only evidence that the trial judge even considered the "compromise verdict" issue was his denial of Resilite's motion to reconsider the order for a partial new trial on damages only. This motion was denied without opinion, and hardly constitutes an affirmative decree by the trial judge that the jury verdict on damages and liability were wholly unrelated, as contended by the Petitioner.

2. The Issue of Damages is Not Always Independent of the Liability Issue in Personal Injury Case.

Petitioner has selectively cited a portion of the opinion in *Yates* v. *Dann*, 11 F.R.D. 386 (D.C. Del. 1951) for the prop-

osition that the issues of liability and damages in personal injury cases are always independent. Clearly this is not so. Courts have, on many occasions, required new trials on all issues in personal injury cases where extremely low damages were awarded in an apparent compromise on the issue of liability. See e.g. *Southern R. Co.* v. *Madden,* 235 F.2d 198, 204 (4th Cir. 1956); *Schuerholz* v. *Roach,* 58 F.2d 32 (4th Cir. 1932); *Simmons* v. *Fish,* 210 Mass. 563, 565, 97 N.E. 102 (1912). The latter case was cited with approval by the United States Supreme Court in what the petitioner has referred to as "the classic Supreme Court case in this area" (A. 16), *Gasoline Products Co.* v. *Champlin Refining Co.,* 283 U.S. 494, 500, 501 (1931).

The fact that the instant action involved a personal injury is absolutely irrelevant to the question of whether a partial new trial "may be had without injustice," *Gasoline Products Co.* v. *Champlin Refining Co., supra* at 500, since courts have decided the issue both ways in personal injury actions depending upon the circumstances.

The United States Supreme Court has warned lower federal courts to be wary of allowing partial new trials. A re-trial of only certain issues

> may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.

Id. The presumption should therefore be in favor of ordering a new trial on all issues unless the fairness of a partial retrial is clearly stated.

3. The Court of Appeals Withdrawn Opinion did Not Recognize Resilite's Liability for Breach of Warranty.

The portion of the Court of Appeals' opinion cited by the petitioner (A. 77) relates only to the jury verdict on *negligent* failure to warn. The opinion clearly suggests that the finding of negligence against Resilite may well have arisen out of a finding that Resilite maintained the product for several years after its initial sale to Harvard. Thus the jury's finding of negligent failure to warn may or may not have had any impact on a decision regarding breach of warranty in failing to warn. Since the Court of Appeals did hold that "the case was submitted to the jury and decided by it only on negligent failure to warn" (A. 76) it is misleading for the petitioner to suggest that the Court of Appeals "clearly recognized the soundness to the jury's verdict on Resilite's liability." The Court of Appeals never recognized that the jury ever made a finding of *warranty* liability on the part of Resilite.

4. The Court of Appeals Withdrawn Opinion did Not Reflect Any Decision on the "Compromise Verdict" Issue.

The Court of Appeals never suggested in its first opinion that there had been no jury "compromise." In fact, the Court of Appeals specifically reserved any opinion on this issue in its initial opinion (see further discussion in § B, *supra*).

5. The Court of Appeals was Not Required to Describe in Its Written Opinion the Standard of Review Employed by It In Reaching Its Decision.

The fact that the Court of Appeals may not have articulated, in its January 11, 1985 memorandum and order, the particular standard of review being employed, does not demonstrate any-

thing about the quality of the court's reasoning or the validity of its ruling. In a clear cut case, the shibboleth "abuse of discretion" need not be uttered in order to validate the court's holding. See e.g. *National Fire Ins. Co.* v. *Great Lakes Warehouse Corp.*, 261 F.2d 35 (7th Cir. 1958).

Conclusion.

The instant petition is based solely upon the disappointment of an unsuccessful party to a lower court proceeding. The action of the Court of Appeals for the First Circuit was justified, and indeed, mandated under the record and briefs presented to it.

For all of the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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Supplemental Appendix.

Table of Contents.

Questions to be answered by the jury	1a
Questions to be answered by the jury	3a
Motion of the defendant, Universal-Resilite Corporation, for reconsideration	5a
Rules of the Supreme Court of the United States, Rule 17	6a
Federal Rules of Appellate Procedure, Rule 36	7a
Rules of the United States Court of Appeals for the First Circuit, Rule 14	8a
Massachusetts General Laws, Chapter 231	8a

Supplemental Appendix.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LEONA BRENNER,
Plaintiff
V. CA 79-1308-T
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL.,
Defendants

QUESTIONS TO BE ANSWERED BY THE JURY

Re: Defendant Universal Resilite Company

1) Has the plaintiff proved by a preponderance of the evidence that the defendant was negligent in failing to give adequate warning concerning the use of non-Universal pins with the Universal exercise machine that has been the subject of this litigation?

YES ✓_____ NO _____

2) If your answer to question One is in the affirmative, was the negligence of the defendant a proximate cause of any injury to the plaintiff? (If your answer to question One was in the negative you need not respond to this or any other question.)

YES ✓_____ NO _____

3) If your answers to questions One and Two are in the affirmative, what sum of money would fully and fairly compensate plaintiff for any past, present and future damage you find was caused by defendant's negligence?

$5000

4) Did the plaintiff's own negligence contribute to any injury she sustained?

YES ✓_____ NO _____

5) If your answer to question Four is in the affirmative, to what degree did plaintiff's own negligence contribute to any injury she sustained?

95%_____

March 24, 1983
DATE

/s/Theodore Meraski
FOREMAN OF JURY

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LEONA BRENNER,
Plaintiff

V. CA 79-1308-T

PRESIDENT AND FELLOWS OF
HARVARD COLLEGE, ET AL.,
Defendants

QUESTIONS TO BE ANSWERED BY THE JURY

Re: Defendant President and Fellows of Harvard College

1) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in altering the Universal machine that is the subject of this litigation?

YES ✓_____ NO _____

2) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent when it allowed its students to use the Universal machine that is the subject of this litigation?

YES ✓_____ NO _____

3) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in supervising and providing instructions as to the use of the Universal machine that is the subject of this litigation?

YES _____ NO ✓_____

4) Has the plaintiff established by a preponderance of the evidence that Harvard was negligent in failing to give adequate warning to its students concerning the use of non-Universal pins with the Universal machine that is the subject of this litigation?

YES ✓_____ NO _____

If none of your answers to questions One through Four is "yes", you need not answer any other questions.

5) With respect to any of the questions One through Four to which you may have answered "yes", please state whether or not the negligence of the defendant was a proximate cause of any injury to the plaintiff.

Question One	YES ✓	NO _____
Question Two	YES ✓	NO _____
Question Three	YES _____	NO _____
Question Four	YES ✓	NO _____

6) If your answers to the corresponding parts of question Five *and* Questions One, Two, Three or Four are in the affirmative, what sum of money would fully and fairly compensate plaintiff for any past, present and future damage you find was caused by defendant's negligence?

$5000

7) Did the plaintiff's own negligence contribute to any injury she sustained?

YES ✓ NO _____

8) If your answer to question Seven is in the affirmative, to what degree did plaintiff's own negligence contribute to any injury she sustained?

95%

March 24, 1983
DATE

/s/Theodore Meraski
FOREMAN OF JURY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 79-1308T

LEONA BRENNER,
VS.
THE PRESIDENT AND
FELLOWS OF HARVARD
COLLEGE, ET AL

MOTION OF THE DEFENDANT, UNIVERSAL RESILITE CORPORATION, FOR RECONSIDERATION

The defendant, Universal Resilite Corporation, moves that the court reconsider its order of July 21, 1983 allowing the plaintiff's motion for a new trial limited to the issue of damages by also requiring a new trial on the issues of URC's liability to the plaintiff for her injuries in the instant action.

In support of its motion, the defendant states that the extremely small amount of damages originally awarded by the jury, combined with its finding of 95% contributory negligence, suggests that the jury reached a "compromise verdict". Consequently, a new trial on both liability and damages is required.

In further support of this motion, the defendant refers the Court to the memorandum of counsel attached hereto.

DENIED

/s/ J. Tauro, D.J.
12/20/83

By its attorney,

/s/ _____
Richard J. Riley
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523-2340

DATED: October 20, 1983

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 36. Entry of Judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

RULES OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Rule 14
Opinions

Because of the increase in filings, the court finds itself unable to write opinions, or full opinions, in every case. The absence of such does not necessarily mean that the case is considered unimportant. It does mean that no new points of law, making the decision of general precedential value, are believed to be involved.

Because unpublished memoranda and opinions of this and other courts usually fail to disclose fully the rationale of the court's decision, and because they are not uniformly available to all persons, they are never to be cited in unrelated cases, unless they are in the process of being published. For this court's Plan for Publication of Opinions see Appendix B.

MASSACHUSETTS GENERAL LAWS.
Chapter 231.

§ 85. Comparitive negligence; limited effect of contributory negligence as defense

Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable

to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.

The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The defense of assumption of risk is hereby abolished in all actions hereunder.

The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.